

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 DALE R. MITCHELL,)
9 Plaintiff,) No. CV-03-492-CI
10 v.) ORDER RESERVING RULING ON
11 JEFFREY CARLSEN, LAWRENCE) MOTION FOR APPOINTMENT OF
12 PORTER, KARLA M. POWELL, CHRIS) COUNSEL AND DENYING MOTION
13 RUNDLETT, JEFF WARD, and BRENDA) FOR TEMPORARY RESTRAINING
DESHAZER,) ORDER
Defendants.)

15 BEFORE THE COURT are Plaintiff's Motions for temporary
16 restraining order and appointment of counsel, noted for hearing
17 without oral argument on November 18, 2005. (Ct. Rec. 59, 73.)
18 Plaintiff is appearing pro se; Assistant Attorneys General Mary
19 McLaughlan and Dan Judge represent Defendants. The parties have
20 consented to proceed before a magistrate judge. (Ct. Rec. 51.)

MOTION FOR APPOINTMENT OF COUNSEL

22 Plaintiff seeks relief under 42 U.S.C. § 1983 from Defendants,
23 alleging they retaliated against him, confiscated and destroyed
24 religious and legal materials, and subjected him to disciplinary
25 actions after he filed a state tort claim against prison officials.
26 Plaintiff seeks appointment of counsel, contending he has inadequate
27 and obstructed access to legal materials. Plaintiff contends he is
28 without resources to formulate necessary jury instructions needed

1 for trial, he is without funds to retain counsel, the claims are
2 complex and include credibility issues, he does not have an ability
3 to present the case pro se, and the merits of the case warrant
4 appointment of counsel.

5 Appointment of counsel is authorized pursuant to 28 U.S.C. §
6 1915(d). However, under that statute, the court has jurisdiction to
7 designate counsel only in exceptional circumstances. *Wilborn v.*
8 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). Whether
9 exceptional circumstances exist requires this court to evaluate the
10 success of the complaint on the merits and the ability of the
11 claimant to articulate his claims pro se in light of the complexity
12 of the legal issues involved. *Id.* "Neither of these factors is
13 dispositive and both must be viewed together before reaching a
14 decision on request for counsel under section 1915 (d)." *Id.* at
15 133.

16 In light of Plaintiff's successful articulation of his claims
17 to the present date and his assertion he requires the assistance of
18 counsel to prepare jury instructions, a ruling on Plaintiff's Motion
19 is **RESERVED** pending this court's disposition of the cross-Motions
20 for Summary Judgment, noted for hearing without oral argument on
21 December 16, 2005.

22 **MOTION FOR TEMPORARY RESTRAINING ORDER**

23 Plaintiff moves for preliminary injunctive relief contending
24 Defendants are depriving him of his right to the free exercise of
25 religion. Plaintiff asserts on February 20, 2003, and December 15,
26 2003, prison staff executed a search of Plaintiff's cell and on each
27 occasion confiscated and destroyed sacred religious texts.
28 Plaintiff claims prison staff are alleging the texts had been

1 altered and thus posed a threat to prison security. He seeks an
2 order from this court directing Defendants to replace or restore
3 religious scriptures confiscated and destroyed. Additionally, he
4 seeks an order directing Defendants to produce evidence that his
5 religious property was in fact altered or owned by another prisoner.

6 During the search in February, Plaintiff asserts he was engaged
7 in a lawsuit against Defendants alleging a violation of his
8 religious rights; in retaliation, prison officials confiscated and
9 destroyed Plaintiff's Holy Qu'rans, a religious study guide by
10 Elijah and two prayer beads. Plaintiff alleges Defendants advised
11 him the Holy Qu'ran was altered because it had a ripped, torn or
12 missing cover and the study guide was altered because it had a
13 blacked-out spot inside. Plaintiff further alleges these materials
14 were necessary for him to fully participate in the Islamic month of
15 Ramadon.

16 In December, Plaintiff alleges, Defendants confiscated and
17 destroyed his Holy Bible, King James Version because it had a
18 blacked-out spot inside.

19 "To obtain a preliminary injunction, [Plaintiff] must show
20 either (1) 'a likelihood of success on the merits and the
21 possibility of irreparable injury' or (2) 'the existence of serious
22 questions going to the merits and the balance of hardships tipping
23 in [Plaintiff's] favor.'" See *Nike, Inc. v. McCarthy*, 379 F.3d 576,
24 580 (9th Cir. 2004) (quoting *Gilder v. PGA Tour, Inc.*, 936 F.2d 417,
25 422 (9th Cir. 1991)). "These two alternatives represent 'extremes
26 of a single continuum,' rather than two separate tests. Thus, the
27 greater the relative hardship to [Warsoldier], the less probability
28 of success must be shown." See *Walczak v. EPL Prolong, Inc.*, 198

1 F.3d 725, 731 (9th Cir. 1999) (citation omitted). When a plaintiff
 2 seeks to enjoin the activity of a government agency, his case must
 3 contend with "the well-established rule that the Government has
 4 traditionally been granted the widest latitude in the 'dispatch of
 5 its own internal affairs,' *Cafeteria and Restaurant Workers Union*
 6 *Local 473 A.F.L.- C.I.O. v. McElroy*, 367 U.S. 886, 896 (1961),"
 7 quoted in *Sampson v. Murray*, 415 U.S. 61, 83 (1974). "When a state
 8 penal system is involved, federal courts have . . . additional
 9 reason to accord deference to the appropriate prison authorities."
 10 *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Finally, under 18
 11 U.S.C. § 3626(a)(1)(A):

12 Prospective relief in any civil action with respect to
 13 prison conditions shall extend no further than necessary
 14 to correct the violation of the Federal right of a
 15 particular plaintiff or plaintiffs. The court shall not
 16 grant or approve any prospective relief unless the court
 17 finds that such relief is narrowly drawn, extends no
 18 further than necessary to correct the violation of the
 19 Federal right, and is the least intrusive means necessary
 20 to correct the violation of the Federal right. The court
 21 shall give substantial weight to any adverse impact on
 22 public safety or the operation of a criminal justice
 23 system caused by the relief.

24 Prison inmates "retain protections afforded by the First
 25 Amendment, including its directive that no law shall prohibit the
 26 free exercise of religion." *O'Lone v. Estate of Shabazz*, 482 U.S.
 27 342, 348(1987) (citation omitted). Here, Plaintiff does not allege
 28 a prison regulation is unconstitutional on its face, but rather
 specific acts described as retaliatory, including cell searches and
 confiscation and destruction of his religious property.

Defendants do not dispute Plaintiff is permitted to have a
privately purchased or donated copy of the Qu'ran in his possession.
Additionally, copies of the Qu'ran are available on loan from the

1 Airway Heights Correctional Center (AHCC) library for up to one
2 month at the time or from a library for members of the Muslim faith.
3 (Ct. Rec. 72, Ex. 1, Lajueness Decl. at 1, 2.) Defendants assert
4 two copies of the Qu'ran were seized from Plaintiff's cell in
5 February 2003, one of them because it had a self-made cover.
6 Plaintiff admitted during deposition testimony that this copy was
7 returned to him when he removed the cover. (Ct. Rec. 69, ¶ 33, Ex.
8 A, Mitchell Dep. at 135:21-25.) Thus, the fact a second copy was
9 confiscated and not returned has not caused Plaintiff irreparable
10 injury within the meaning of the case law. Additionally, copies
11 were available through other sources, including the Muslim library,
12 the state library, or through a donation program. (Ct. Rec. 72, Ex.
13 1, Lajueness Decl. at 2.)

14 Plaintiff next contends he will prevail on the merits, noting
15 the destruction of his property was accomplished in violation of
16 prison regulations, which provide that an inmate will be given a
17 receipt for confiscated property and the disposition of the property
18 will be made after consultation with the Chaplain, citing Airway
19 Heights Corrections Center (AHCC) Field Instruction 560.200(VI)(D).
20 However, for the limited purposes of addressing Plaintiff's Motion
21 for immediate injunctive relief, a violation of a prison regulation
22 as described is not sufficient to establish Plaintiff will likely
23 succeed on the merits of his First Amendment free exercise clause.
24 Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Appointment of Counsel (Ct. Rec.
27 73) is **RESERVED** pending disposition of the cross-Motions for summary
28 judgment.

2. Plaintiff's Motion for temporary injunctive relief (Ct. Rec. 59) is DENIED.

3. The District Court Executive is directed to enter this Order and furnish copies to Plaintiff and counsel for Defendants.

DATED November 29, 2005.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE